UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	15-CV-2627 (JA)(RLM)

PLAINTIFF'S RESPONSE TO DECLARATION OF VAN HORN AND REQUEST FOR ENTRY OF JUDGMENT PURSUANT TO RULES 56 AND 58

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INTRODUCTION

This action was brought by Plaintiff Louis Flores ("Plaintiff" of "Flores") against Defendant United States Department of Justice ("DOJ" or the "Government") to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and the First Amendment, U.S. Const. amend. I., for injunctive and other appropriate relief, seeking the immediate processing and release of agency records requested by Plaintiff pursuant to a FOIA request, dated 30 April 2013 (the "First FOIA Request"). During proceedings before this Court, Plaintiff filed another FOIA request, dated 20 October 2015 (the "Second FOIA Request," and, collectively with the First FOIA Request, the "Free Speech FOIA Requests").

BACKGROUND

This litigation commenced after Defendant violated FOIA for over two years. Attempts by Plaintiff to resolve outstanding issues with the DOJ after litigation commenced were cut short by the Memorandum and Order issued by the Court on 09 November 2015, wherein DOJ's request to initiate dispositive motion practise was granted. (Dkt. No. 19). On 23 November 2015, Defendant filed its motion for summary judgement and supporting documents. (Dkt. No. 20). On 5 January 2016, Plaintiff filed a cross-motion for partial summary judgement and related documents. (Dkt. No. 24). During Plaintiff's negotiations during this action, it became apparent that the DOJ was not acting in good faith and was making misrepresentations to Plaintiff, including producing suspect documents to Plaintiff or submitting suspect documents into evidence before this Court. Consequently, on 05 January 2016, Plaintiff filed a motion for sanctions and penalties. (Dkt. No. 25). Defendant answered Plaintiff's motions on 12 February 2016, and Plaintiff filed surreplies on 25 February 2016. Oral arguments over the motions were heard on 11 July 2016.

Before the Court issued its ruling on the dispositive motions, the Court ordered Defendant to produce a new declaration to cure a defective declaration, and the Court directed the DOJ to conduct another search for records "using the term 'demonstrations'

and variants thereof." (Dkt. No. 37). DOJ requested an extension of time to prepare the declaration and to conduct the supplemental search, admitting that the Declarant Karin Kelly was no longer employed by the DOJ. (Dkt. No. 38). Plaintiff objected to the granting of an extension of time. (Dkt. No. 39). The Court overruled Plaintiff's objection and granted the extension of time. (Dkt. No. 40). On 24 August 2016, Defendant filed a new declaration. (Dkt. No. 41).

ARGUMENT

The Declaration of Daniel F. Van Horn submitted by Defendant was made in bad faith, and the Court must reject this Declaration.

I. Rule 56

According to Rule 56(h), if a party is found to have submitted an affidavit or declaration during dispositive motion practise in bad faith or solely for delay, "An offending party or attorney may . . . be held in contempt or subjected to other appropriate sanctions" by the Court. Fed. R. Civ. P. 56(h).

II. Rule 58

According to Rule 58(c)(2)(B), the Court must enter an order within 150 days of an entry in the docket. Fed. R. Civ. P. 58(c)(2)(B).

III. The Declaration of Daniel F. Van Horn was made in bad faith

A. The supplemental search did not include any search of document management systems.

According to information obtained by Progress Queens, the online news publication published by Plaintiff, the U.S. Attorney's Office for the Southern District of New York uses applications named Concordance and IPRO to manage digital documents. The Declaration of Daniel F. Van Horn is silent as to whether the U.S. Attorney's Office for the District of Columbia uses any applications to store, retrieve, or manage digital documents. (Van Horn Decl., ¶ 10). Just because Declarant Daniel F. Van Horn could not use either RCIS or LIONS to replicate a digital document management system does not let the DOJ off the hook from searching whatever digital document

management system it does have. Furthermore, Declarant Daniel F. Van Horn used the recollections of other employees of the U.S. Attorney's Office for the District of Columbia to try to determine whether guidelines exist in digital format. Using the recollections of others should not be accepted by this Court as an inferior facsimile for having conducted an actual search of any digital document management system. Clarification is in order as to whether the U.S. Attorney's Office for the District of Columbia should be ordered to conduct a search for records responsive to the First FOIA Request from any digital document management system used by the DOJ. Furthermore, because the Court ordered that Main Justice conduct a search for records, then Main Justice should be compelled to conduct a search of its digital management system, particularly since the DOJ never provided a Declaration for the search. (Dkt. No. 14).

B. The Declaration of Daniel F. Van Horn identified six boxes of records.

The Declarant admitted that six boxes of records exist for the prosecution file. (Van Horn Decl., ¶ 11). As the Court will note, the Red Herring Response produced by Defendant to the First FOIA Request solely comprised 331 pages, less than it would take to fill one Redweld. (Flores Decl., Ex. F).

The DOJ has a duty to comply with FOIA, and when the DOJ breaches that duty, it is acting in bad faith and raises questions about the DOJ's lack of credibility in proceedings before this Court. At least twice, Plaintiff has requested an index of the records it withheld from the Red Herring Response (the "Exempted Records"), but the DOJ has not produced such an index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (Singh Decl., Ex. N). The request of a *Vaughn* Index is used to, amongst other things, identify each document and to, essentially, confirm the correct application of Exemptions. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974). *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n. 1 (9th Cir. 1995). The DOJ's failure to provide such a routine index that can reasonably be expected would be requested to confirm the correct application of Exemptions points to the degree to which the DOJ has been uncoöperative and/or hindering the Free Speech

FOIA Requests. The DOJ's willingness to breach its duty to comply with FOIA means that the Court must now intervene, particularly since the DOJ has admitted that six boxes of records exist, but only less than one Redweld has been produced.

C. The Declaration of Daniel F. Van Horn rests on information provided by Angela George.

The Declaration of Daniel F. Van Horn rests on information provided by Angela George, the Assistant U.S. Attorney, who prosecuted Lt. Daniel Choi ("George"). (Van Horn Decl., ¶¶ 12-13). In Plaintiff's memorandum for sanctions, Plaintiff has questioned whether George has interfered with Government administration. (Pl. Mem. at 33-34). Consequently, it may be inappropriate for key information provided in the Declaration of Daniel F. Van Horn to be underpinned by representations made by George. To the extent that the Court finds that George interfered with Government administration once the Court rules on Plaintiff's motion for sanctions, the Court must find the Declaration of Daniel F. Van Horn to be inadequate.

D. The Declarant engages in hearsay, and the Declaration makes a narrow reading of the First FOIA Request

The Declaration of Daniel F. Van Horn seeks to enter heresay into the record. The Declarant makes the representation that Plaintiff clarified the records being sought under the First FOIA Request. (Van Horn Decl., ¶ 8). The First FOIA Request speaks for itself ; the categories of those records were made plainly evident in the First FOIA Request, and the subject matter of the categories of records are undisputed in the Court record. (PL 56.1 Answer ¶ 8). Declarant has no legal standing to make any representation on Plaintiff's behalf, and because Declarant was not present for the proceedings of the oral arguments of 11 July 2016, it would be hearsay for the Court to accept the Declaration of Daniel F. Van Horn. Moreover, at no time has Plaintiff made any amendment in writing to alter the First FOIA Request or Plaintiff's 56.1 Answer. The Court has been made aware in Plaintiff's opposition memorandum and in plaintiff's memorandum for sanctions that Plaintiff has objected to the DOJ's narrow reading of the First FOIA Request. (Pl. Opp. Mem. at 21-23). (Pl. Mem. at 17-18). Finally, the

Declarant cited a transcript to the oral arguments that Plaintiff requested from the Court and was denied due to costs that the Court refused to waive for Plaintiff and that Defendant refused to request and share with Plaintiff. *See* Ex. A. Furthermore, at no time was Plaintiff ever provided an *errata* sheet for any such transcript.

E. The Declaration of Daniel F. Van Horn attached records previously withheld from Plaintiff.

The Declarant included in his Declaration correspondence exchanged between U.S. Representative Mark Pocan and the DOJ about the prosecution of activists. (Van Horn Decl.). The late production of these records again suggests that the DOJ has been withholding records from Plaintiff. Plaintiff argued in the memorandum for sanction that if it can be shown that the DOJ has more records or *Vaughn* Indexes to disclose, in contravention to the misrepresentations that the DOJ has made before this Court, then that means that the DOJ has been acting in bad faith and must be found in contempt and face sanctions and penalties. (Pl. Mem. at 40). How many more records is the DOJ withholding now, that it will produce later, only after the Court enters more orders for the production of records that have been established are likely to exist ?

F. Even after the Court ordered the DOJ to search for records regarding the term " 'demonstration' and variants thereof," the DOJ again submits a declaration to the Court during judicial proceedings that omits guidelines for the prosecution of individuals participating in "demonstrations," in accordance with guidance cited in the U.S. Attorneys' Manual.

When Defendant produced the Second FOIA Response, Defendant included guidelines from the United States Attorneys' Manual applicable to "demonstrations." (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880-82. The DOJ also produced other records from the United States Attorney's Manual in the Second FOIA Response. (Flores Decl., Ex. G at Tabs E and G).

We know from the few responsive records produced by the DOJ that when the Federal Bureau of Investigation ("FBI") begins an investigation of activists under one of the DOJ's guidelines, the FBI will consult with an U.S. Attorney. Investigative decisions are made by U.S. Attorneys. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United

States Attorneys' Manual § 9-65.881. Decisions, determinations, and interpretations of laws that lead to the prosecution of activists are records responsive to the First FOIA Request, because this would be working law, or agency law.

Under the same section, there is legal advice given to the DOJ by the U.S. Department of State about criminal charges being disposed under local law. *Id.* In Plaintiff's memorandum in opposition to Defendant's motion for summary judgement, Plaintiff argued that the guidance provided by the U.S. Department of State to the DOJ under § 9-65.881 of the United States Attorneys' Manual applicable to "demonstrations" is responsive to the First FOIA Request. (Pl. Opp. Mem. at 37). When the Court entered its Order following oral arguments of the dispositive motions, the Court ordered that the DOJ conduct a search for records regarding the term " 'demonstration' and variants thereof." (Dkt. No. 37 at 2). Yet, despite Plaintiff's argument and the Court's Order, the DOJ has refused to produce the communication from the U.S. Department of State that determines why "most conduct in possible violation of [18 U.S.C. § 970] is more appropriate for disposition under local law." *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. The Court must compel production of the communication from the U.S. Department of State and all associated records.

Furthermore, according to information made public by the New York City Department of Investigation, the New York Police Department has admitted that it shares information that may lead to the prosecution of activists as "is required to be disseminated by interagency agreement, statute, or other law."[1/] If the DOJ has entered into any such interagency agreement that provides guidance on the prosecution of activists, the DOJ must produce those interagency agreements, because they would be responsive to the First FOIA Request. (PL 56.1 Answer ¶ 8(a)(vi) (demanding to know whether agencies other than the DOJ can prosecute activists and under what conditions and under what approvals)).

1/ *See* Mark Peters & Philip Eure, *An Investigation of NYPD's Compliance with Rules Governing Investigations of Political Activity*, City of New York Department of Investigation (Aug. 23, 2016), http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_intel_report_823_final_for_release.pdf (Appendix A at 16).

Knowing Plaintiff's argument and knowing the Court's Order, Defendant allowed Declarant Daniel F. Van Horn to enter a Declaration into the Court's record that deliberately omits any mention of legal guidance that is applicable to U.S. Attorneys in respect of the prosecution of individuals, who participate in demonstrations. Besides George, now Declarant Daniel F. Van Horn claims ignorance of the United States Attorneys' Manual. Because Counsel for the Government allowed this Declaration to be entered into the Court's record, Counsel for the Government must now be found to have acted in bad faith, in accordance with Rule 56(h).

G. The Declaration of Daniel F. Van Horn is silent on working law, and this is wrong.

In addition to the above issues with the Declaration of Daniel F. Van Horn, Declarant Daniel F. Van Horn makes a fatally-flawed representation : Since neither he nor George claim to know about written guidelines that determine how the Government balances the First Amendment rights of activists when prosecuting activists for their activism, then he reasoned that no such guidelines exist. But this unreasoned conclusion has been shown to be demonstratively false. The Government has produced working law that demonstrates that Federal prosecutors rely upon interpretations of laws to prosecute activists for their activism. The Government has also acknowledged procedures that likely have generated records about the prosecution of activists, notably in the United States Attorneys' Manual. However, the DOJ is and has been unwilling to acknowledge the existence of documents responsive to the First FOIA Request and the Second FOIA Request, and the DOJ provided a No Number, No List response for the Exempted Records. As argued in Plaintiff's opposition memorandum, under the working-law doctrine of FOIA, agencies must disclose the rules and interpretations that constitute their formal or informal policy. (Pl. Opp. Mem. at 20).

As improbable as it may seem, were the Court to take the DOJ at its word -- that no general guidelines for the prosecution of activists exist (which is in doubt, given the guidelines in the Unites States Attorneys' Manual that identify the communication from the U.S. Department of State) -- then the DOJ must provide its working law documents,

as it did when it produced the "Myers memo (email)" and "Capt. Guddemi's November 22 email" that the Government used to prosecute activists. (Flores Decl., Ex. G at Tabs A and B). Plaintiff already provided examples of names of activists in the First FOIA Request, in the Complaint, and in the Plaintiff's Index of References to Records Requested under FOIA Request. (Dkt. No. 12 at Ex. I to Ex. C). (Dkt. No. 15). (Flores Ex., Ex. L). As noted in Plaintiff's opposition memorandum, when the Court ordered the DOJ to conduct a search of Main Justice and to produce at least some of the records on Plaintiff's Index of References to Records Requested under the FOIA Request, that Order now prevents the DOJ from invoking any exemption to the records being requested. (Pl. Opp. Mem. at 13-14). Furthermore, even in the absence of general guidelines that the DOJ claims it does not have, the DOJ somehow prosecuted all the activists listed on Plaintiff's Index of References to Records Requested under the FOIA Request. Using what interpretations of law did the DOJ use to prosecute all those activists ? These are records the DOJ must now produce without the ability to invoke any Exemption.

Plaintiff hoped that, by providing examples of names of other activists, who had been prosecuted for their activism, it would make it easier for the DOJ to locate and produce the working law for these prosecutions. (PL 56.1 Answer ¶ 40). But such is the DOJ's resistance to voluntarily comply with FOIA to disgorge its working law that the DOJ refused to provide the interpretations of law used to prosecute the activists on Plaintiff's Index of References to Records Requested under the FOIA Request. Consequently, in the alternative to providing general guidelines, which, as the DOJ claims, may not exist, with the notable exception being the communication from the U.S. Department of State as identified in the United States Attorneys' Manual, then the DOJ must produce the equivalent of the "Myers memo (email)" and "Capt. Guddemi's November 22 email" for all of the activists that Plaintiff has identified in the record of the proceedings before this Court, so that the public can benefit from the disclosure of the DOJ's working law applicable to the specific prosecution of activists. *See also U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881.

IV. The bad faith acts of failing to search document management systems ; the identification of six boxes of records that have not been indexed according to *Vaughn* ; the reliance on information from a USAO-DC employee, who has withheld information from the EOUSA ; the narrow reading of the First FOIA Request, the hearsay, and no agency for Declarant to speak on behalf of Plaintiff ; the representation that a search was made for records of "demonstration" without producing "demonstration" records from the United States Attorneys' Manual, and the failure to provide working law were deliberate.

As Plaintiff has demonstrated by exhibits submitted from mainstream media reports, the Government refuses to comply with FOIA until litigation commences and is compelled into compliance by the Courts.[2/] The failings in the Declaration of Daniel F. Van Horn show that the DOJ is still engaged in a pattern of delay with the Courts. In Plaintiff's memorandum for sanctions, Plaintiff argued that the Court had inherent discretion to order sanctions against a party that had been engaging in a pattern of bad faith. (Pl. Mem. at 12). Plaintiff now points the Court to Rule 56(h) for additional legal authority available to the Court to find that the Declaration of Daniel F. Van Horn was submitted to the Court in bad faith. Rule 56(h) is also available to the Court to address the suspect exhibit submitted into the record in the Declaration of Rukhsanah Singh, an issue raised in Plaintiff memorandum for sanctions. (Pl. Mem. at 34).

V. Because the DOJ has not acted to fully produce responsive records, particularly records that are known to likely exist, the Court must rule on Plaintiff's motion for sanctions now.

For unknown reasons, the Court chose to allow the DOJ to initiate dispositive motion practise without having addressed legal issues raised by Plaintiff once Plaintiff received the Second FOIA Response and the Declarations of each of Karin Kelly and Principa Stone. In the Joint Reportback to the Court, the DOJ admitted that it was not going to comply with FOIA voluntarily without Court orders when it said, "Defendant, accordingly, believes that motion practice is necessary and does not believe that further meet and confers would be an efficient use of the parties' time and resources at this

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2/ *See, e.g.*, Hadas Gold, *NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), http://www.politico.com/blogs/media/2014/12/nyt-vice-mother-jones-top-foia-suits-200325.html (noting that the top defendant was the DOJ).

time." (Dkt. No. 18). Because Plaintiff filed surreplies on 25 February 2016, Plaintiff respectfully requests that the Court issue a report of recommendations so that judgments can be entered in respect of the dispositive motions, so that the DOJ is no longer allowed to drag out this litigation indefinitely with its piecemeal responses to the detriment of the Court and Plaintiff. During oral arguments, the Court chastised Plaintiff for filing with the Court the Red Herring Response and the First FOIA Response as exhibits to his motions. But it is not Plaintiff's fault for seeking justice from the Court – it is the DOJ's fault for violating FOIA and for remaining out of compliance with FOIA, including during proceedings before this Court. The record is clear that this is the Government's legal strategy with respect to FOIA. (Flores Decl., Ex. BB-GG). And as Plaintiff has asserted over and over again, the DOJ will only produce records at the discretion of this Court.

CONCLUSION

Based on the hearsay in the Declaration of Daniel F. Van Horn, Plaintiff strongly objects to entry of this Declaration into the Court's record, asks that the Declaration of Daniel F. Van Horn be resubmitted without the hearsay of Paragraph 8, that other corrections be made, as noted herein, and that the Court issue an admonishment to the Declarant Daniel F. Van Horn, who, as an officer of the Court and an officer of the U.S. Attorney's Office, should know better than to speak without agency on behalf of Plaintiff. The Court must also admonish Counsel for the Government for submitting such a faulty Declaration into the Court's docket.

Since the filing of Plaintiff's motion for sanctions, the Court has already ordered a second search for records and for the filing of a new declaration. (Dkt. No. 37). The latest declaration reveals that the No List, No Number response for the Exempted Records amounts to six boxes of records. How many more inadequacies or failings will the Court need to find, before the Court sanctions the DOJ ? Counsel for the Government was notified by virtue of Plaintiff's motion for sanctions that Plaintiff was seeking sanctions, penalties, and fines for the Government's misconduct. That, in the face of

such notice, the Government would deliberately submit the bad faith Declaration of Daniel F. Van Horn is material to proving that the Government is not interested in voluntarily complying with FOIA. Because the Government is not willing to voluntarily comply with FOIA, the Court must issue a report of recommendations that can be used for the entry of judgments pursuant to the Court's Minute Order of 27 May 2016.

Respectfully submitted,

Dated : Jackson Heights, New York
02 August 2016

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Exhibit A

From: "Singh, Rukhsanah (USANYE)" <Rukhsanah.Singh@usdoj.gov>
Subject: RE: Flores v. DOJ (15-CV-2627) - Hearing on Monday
Sent date: 07/06/2016 05:09:23 PM
To: "Louis Flores"<louisflores@louisflores.com>

Dear Mr. Flores,

You may contact the court to inquire if the hearing will be recorded.

Thank you,

Rukhsanah L. Singh
Assistant United States Attorney
U.S. Attorney's Office, Eastern District of New York
271 Cadman Plaza East, 7th Floor
Brooklyn, New York 11201
Telephone: (718) 254-6498
Fax: (718) 254-6081

From: Louis Flores [mailto:louisflores@louisflores.com]
Sent: Wednesday, July 06, 2016 4:51 PM
To: Singh, Rukhsanah (USANYE)
Subject: Flores v. DOJ (15-CV-2627) - Hearing on Monday

Dear Ms. Singh :

I have been notified by the chambers of the U.S. Magistrate Judge Roanne Mann that we have a hearing on Monday at 10 a.m. to provide argument for the motions.

Can your office supply a court reporter for this hearing ?

The last time we appeared before the U.S. Magistrate Judge, you said you did not remember our discussion during the Initial Conference. If your office can supply a court reporter, then we will have a record that we can both use to refer about the discussion during Monday's hearing.

Please confirm by tomorrow that you can arrange for a court reporter, or else I will ask the Court to supply one for me, since I am a pro se plaintiff.

Thank you kindly.

-- Louis

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

15-CV-2627 (JG)(RLM)

AFFIRMATION OF SERVICE

I, **LOUIS FLORES**, declare under penalty of perjury that I have served a copy of the attached **PLAINTIFF'S RESPONSE TO DECLARATION OF VAN HORN AND REQUEST FOR ENTRY OF JUDGMENT PURSUANT TO RULES 56 AND 58** upon **RUKHSANAH L. SINGH**, whose address is : c/o United States Attorney's Office, Eastern District of New York, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201 by **ELECTRONIC MAIL DELIVERY** to : rukhsanah.singh@usdoj.gov.

Dated : Jackson Heights, New York
2 August 2016

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